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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

ROBERT D. HODORY,

Petitioner,

vs.

JOHN HAMILTON,

Respondent.

Petition For Writ Of Certiorari To The Florida District Court Of Appeal For The Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Florida courts refused to recognize Hodory's federal rights and controlling case law?

2. Whether the Florida courts deprived Hodory of his federal rights where, in granting summary judgment, they disregarded controlling precedent from this Court?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Florida District Court of Appeal for the Second District were petitioner Robert D. Hodory and respondent John Hamilton.

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PETITION FOR WRIT OF CERTIORARI

Robert D. Hodory petitions that a writ of certiorari issue to review the judgment and opinion of the Florida District Court of Appeal for the Second District entered in this case on December 14, 1990.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal (Appendix 23) and the order denying rehearing, clarification and certification (Appendix 24) are unreported. The order and final judgment of the circuit court (Appendix 19-22) are also unreported.

JURISDICTION

On December 14, 1990, a panel of the Florida District Court of Appeal for the Second District decided *Hodory v. Hamilton*, Case No. 89-02353. (Appendix 23) On January 29, 1991, a panel of the Florida District Court of Appeal for the Second District denied Hodory's timely petition for rehearing (Appendix 24). This Court has jurisdiction to review the final decision of the Second District Court of Appeal pursuant to 28 U.S.C. § 2104 (1988).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The statute principally involved in the decision is the Securities Act of 1933, relevant portions of which are reproduced in the Appendix at 25-26.

STATEMENT OF THE CASE

Preliminary Statement

Congress enacted the Securities Act of 1933 as remedial and to be liberally construed to protect purchasers. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 687 (1985), quoting *SEC v. W.J. Howey Co.*, 329 U.S. 293, 299 (1946); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 131 (1972).

The Circuit Court's Decision

On June 5, 1987, Hodory filed in Circuit Court a four count complaint arising out of Hamilton's sale to him of stock in Weiss-Hamilton Lumber Company, Inc. The complaint alleged breach of contract and violation of the Florida Securities and Investor Protection Act. On February 10, 1988, the Circuit Court (Judge Rives) granted Hodory's motion to amend his complaint. The amended complaint (Appendix 1), which was verified, contains seven counts. Only Count IV (federal securities regulation) and Count V (federal securities fraud) are involved on the petition for certiorari. Judge Farnell, who had replaced Judge Rives, denied Hamilton's motion to dismiss the amended complaint.

On June 21, 1988, Hamilton moved for partial summary judgment on Count IV, purportedly because Hodory failed to bring his action within one year of the sale (15 U.S.C. § 77m, Appendix 26), and because the stock was exempt from registration pursuant to 15 U.S.C. § 77(d)(1), Appendix 25. Hamilton moved for partial summary judgment on Count V, because the statute of limitations (15 U.S.C. § 77m, Appendix 26) purportedly barred the securities fraud court. Hamilton also moved for summary judgment on Counts IV and V because Hodory purportedly was estopped from raising Counts IV and V. On August 19, 1988, Hamilton amended his motion on Count IV to include a claim that the sale was exempt as a "private sale" pursuant to 15 U.S.C. § 77(d)(2). (Appendix 25).

Hamilton's and Hodory's motions were argued in October 1988. The case was set for pretrial conference on December 28, 1988, and for trial beginning February 27, 1989. Judge O'Brien, who had replaced Judge Rives and Judge Farnell, opened the pretrial conference with a one-sentence statement that he was granting Hamilton's amended motion for summary judgment "for all the reasons" in Hamilton's amended motion. Hamilton's attorney prepared an order, which Judge O'Brien signed on January 27, 1989. (Appendix 19). Judge O'Brien signed the final judgment on July 21, 1989. (Appendix 21).

The District Court of Appeal's Decision

On December 14, 1990, the district court of appeal, without explanation, affirmed the circuit court.

On January 28, 1991, the district court of appeal denied Hodory's timely motion for rehearing.

The Underlying Dispute

In an attempt to sell his stock in Weiss-Hamilton Lumber Company, Inc, Hamilton, a Florida resident, used an unlicensed business broker, advertisements in the Wall Street Journal, and communications by telephone and United States mail in interstate commerce. Hodory, an orthodontist from Cincinnati, responded to Hamilton's advertisements and communications. Hodory was especially interested in the monies a business could generate for him.

On May 5, 1986, Hodory entered into an agreement to buy 100% of the stock of Weiss-Hamilton Lumber Company, Inc. Hodory had the right to review financial data of Weiss-Hamilton Lumber Company, Inc., prior to closing on the sale. Hodory reviewed financial data, which he discovered after the closing on June 16, 1986, was incomplete and misleading. The data, among other misstatements, overstated the monies the owners could take from the company and understated the accounts payable. Hodory discovered some misstatements prior to June 16, 1986, but was not aware of the much greater breadth and scope of misstatements until much, much later, when he began to investigate reasons why the Company was losing money, rather than being so profitable as it was represented.

When Hodory became aware of the breadth and depth of the misrepresentations, he brought the subject case in state court on June 5, 1987.

REASONS FOR GRANTING THE WRIT

1. **The Writ Should Be Granted to Instruct State Courts to Recognize a Plaintiff's Federal Rights and Controlling Precedent from this Court**

2. **The Writ Should Be Granted to Prevent Hodory's Federal Rights from being deprived in violation of Controlling Precedent from this Court**

Clearly, this Court has encouraged plaintiffs to bring their federal claims in state court. *See, e.g., Migra v. Warren City School District*, 465 U.S. 75 (1984). As a practical matter, the judicial vacancies in the Middle District of Florida and the preoccupation of the Middle District of Florida with criminal cases strongly encourage plaintiffs to bring their federal claims in state court.

Encouraged to bring his claims in state court, the plaintiff becomes discouraged where, as here, the state courts deny the federal claims without reasoned explanation and in disregard of controlling federal precedent, including precedent from this Court.

To avoid plaintiffs shopping for a federal forum, this Court must ensure that a plaintiff receives the same justice in a state court in Florida that he would receive in a federal court in Florida.

In dismissing Hodory's claims, the Florida courts primarily disregarded *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), which clearly held that the sale of all of a company's stock, as here, was subject to the securities acts. Factually, *Landreth* could be no closer to the subject case. There was a sale of all of the company's stock; the former owner stayed on to help manage the company; and the company's fortunes failed. That the stock in

Landreth had been transferred and that the company in *Landreth* had gone into receivership did *not* estop and purchaser from pursuing his federal remedies. *Estoppel was the only basis the Circuit Court gave for dismissing Hodory's fraud court.* Clearly, the dismissal of the fraud count disregarded *Landreth.* Here, as in *Landreth* "the instrument involved is traditional stock, plainly within the statutory definition. There is no need here . . . to look beyond the characteristics of the instrument to determine whether the Acts apply." 471 U.S. at 690. Moreover, this Court in *Landreth specifically rejected* the argument that the securities acts "were intended to protect only 'passive investors' and not privately negotiated transactions involving the transfer of control to 'entrepreneurs.' " 471 U.S. at 692. Finally, this Court indicated in *Landreth* that there was no exemption form registration where there was a "public offering," such as Hamilton's advertisement in the *Wall Street Journal* here.

Other courts have applied *Landreth* to transactions similar to the subject transaction. See, e.g., *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1233 (10th Cir. 1988); *LHLC Corp. v. Cluett, Peabody & Co.*, 842 F.2d 928, 930 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988); *Schaafama v. Morris Vermont Corp.*, 802 F.2d 629, 636 (2d Cir. 1988); *St. Phillip Towing & Transp. Co. v. Pavers, Inc.*, 768 F.2d 1233 (11th Cir. 1985); *Leoni v. Rogers*, 719 F.Supp. 555, 562-565 (E.D. Mich. 1989). Hodory is entitled to his federal rights being protected in state court just like they would be protected in federal court.

In addition to disregarding *Landreth*, the state courts' purported grounds for dismissal flaunt federal law.

Statute of Limitations (registration count). The attorney prepared order that the statute of limitations barred the federal registration count relied on Hamilton's argument that the statute of limitations began to run on May 5, 1986, the date of the parties' contract, rather than on June 16, 1986, the date of the sale.[1]

Hodory's registration claims are timely if the date of sale were used, but would be untimely if the date of contract were used. Controlling federal precedent in Florida is clear that the statute of limitations runs from the *latest* date of offer, sale or delivery of the stock. *Raiford v. Buslease, Inc.*, 825 F.2d 351, 355 (11th Cir. 1987); *Doran v. Petroleum Management Corp.*, 576 F.2d 91, 93 (5th Cir. 1978). Again, this Court must ensure that a plaintiff receive the same federal substantive rights in a state court in Florida that he would receive in a federal court in Florida.

Estoppel. The attorney prepared order also reflects that Hodory was estopped from bringing the federal registration and fraud claims (Appendix 17). In ruling estoppel, not only did Judge O'Brien ignore *Landreth*, but he did not have the benefit of *Pinter v. Dahl*, 486 U.S. 622 (1988)[2], where this Court held that an *in pari delicto* defense was available against actions for rescission of

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[1] Hamilton conceded on appeal that Hodory's amended complaint of February 2, 1988, relates back to the filing of the complaint on June 5, 1987, which was less than one year after the sale.

[2] This Court decided *Pinter* on June 15, 1988, nine days prior to one of Hamilton's motions for summary judgment.

sale of unregistered securities *only* where the parties were equally culpable. Justice Blackmun wrote:

> "[A] purchaser's knowledge that the securities are unregistered cannot, by itself, constitute equal culpability, even where the investor is a sophisticated buyer who may not necessarily need the protection of the Securities Act. Barring the investor's recovery under the *in pari delicto* doctrine, at least on the basis solely of the buyer's knowledge of the violation, is so foreign to the purpose of the section that there is hardly a trace of it in the decisions under . . . § 12(1)."

Justice Blackmun went on in footnote 13, noting that

> "The panel dissent below expressed concern that failure to provide the *in pari delicto* defense in these circumstances would allow sophisticated investors who purchase unregistered securities to place themselves in a no-lose situation. If the venture proves profitable, the buyer comes out ahead. If the investment goes bad, the buyer can sue to recover his investment in a § 12(1) action. The statute, however, permits such maneuvers. Section 12(1)'s deterrent effect is achieved, to a great extent, by a provision allowing suits for a full year following sale. See 15 U.S.C. § 77m. Thus, the purchaser of unregistered securities may keep his securities and reap his profit if the securities perform well during the year, but rescind the sale if they do not. Although this provision may appear to offend a sense of fair play, allowing the investor to sue regardless of this knowledge of the violation when he purchased the securities, furthers the interest of the Securities Act: the seller then has strong incentive to comply with the registration disclosure provisions. These provisions are concerned with affording the unsophisticated investor information necessary to make a

> knowledgeable investment decision. Permitting the sophisticated investor to recover also serves to protect the unknowing and innocent investor."

As pointed out above, *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), also indicates that Hodory can rescind. There, the purchaser could rescind due to the stock being unregistered even though the purchaser operated the business and even though the business had gone into receivership.

Again, in *Lewis v. Walston Co.*, 487 F.2d 617 (5th Cir. 1973), the Fifth Circuit noted that, where there is a sale of unregistered securities, the buyer has an "absolute" right to rescind.

Where there are allegations and affidavits of fraud, as here, estoppel is clearly inapplicable. As the Eleventh Circuit recently noted in holding that there was insufficient evidence of estoppel on plaintiffs' statutory claims against a commodities broker in *Irvine v. Cargill Investor Services, Inc.*, 799 F.2d 1461, 1462-1463 (11th Cir. 1986):

> "The affirmative defenses of estoppel, waiver and ratification are variations on a theme in that they all serve to prevent plaintiffs from taking unfair advantage of a defendant's misdeeds or from compounding damage resulting from them. *The defenses are, however, not favored and may not be used to bring about ends contrary to public policy.* There is an obvious public policy interest in holding brokers to high level of fiduciary duty. *Defendants have cited no case in which a defense of estoppel, waiver or ratification has been successfully maintained against charges of fraud or against breaches of fiduciary duty.* Even assuming that these defenses could be appropriately invoked against such claims, the record

> before us shows insufficient evidence to support giving the instruction on affirmative defenses to the jury. The facts show that the only significant act on plaintiffs' part was their failure immediately to contact Cargill's higher authorities in Chicago. Plaintiffs, however, did not know early on that their losses were due to unusual circumstances, and when they did have questions their account executives Toronsoe and King provided them with plausible explanations. Their acceptance of explanations, which themselves are part of the wrongdoing alleged against Cargill, is not evidence sufficient to make a jury question of any of the affirmative defenses."

Here, too, Hamilton provided "plausible explanations." As Hodory testified at deposition, it was only much later that Hodory learned the explanations did not make sense.

Exemption (registration). Finally, the attorney-prepared order provided that the stock was not required to be registered based upon the "legal arguments" in Hamilton's motion that the sale was exempt under federal law per 15 USC 577(d)(1) ("transactions by any person other than an issuer, underwriter or dealer"), or as "a private sale," 15 USC § 77(d)(2) ("transactions by an issuer not involving any public offering").[3]

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[3] Even if the exemptions barred Hodory's registration counts, the exemptions would not bar Hodory's fraud counts. *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985); *Daniel v. International Brotherhood of Teamsters*, 561 F.2d 1223, 1244-1246 (7th Cir. 1977), *rev'd on other grounds*, 439 U.S. 551 (1979); *Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd.*, 544 F.2d 1059, 1064 (10th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Nor-Tex Agencies, Inc. v. Jones*, 482 F.2d 1093 (5th Cir.

(Continued on following page)

Of course, the securities acts are remedial and are to be liberally construed to aid the purchaser. *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972); *Folse v. Combined Equities*, 592 F.Supp. 559, 562 (W.D. La. 1984). Exemptions from registration "are construed narrowly, in order to further the purpose of the [securities acts]: 'to provide full and fair disclosure of the character of the securities, . . . and to prevent frauds in the sale thereof . . . " *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980).

It also is well-established that Hamilton had the burden of proving any exemption. *See SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953); *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980); *Swenson v. Engelstad*, 626 F.2d 421 (5th Cir. 1980); *Doran v. Petroleum Management Corp.*, 545 F.2d 893, 899 (5th Cir. 1977); *G. Eugene England Foundation v. First Federal Corp.*, 663 F.2d 988, 989 (10th Cir. 1973); *Quinn & Company v. SEC*, 452 F.2d 943 (10th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *Pennaluna & Co. v. SEC*, 410 F.2d 861, 865 (9th Cir. 1969), *cert. denied*, 398 U.S. 1007 (1970); *Waterman v. Alta Verde Industries, Inc.*, 643 F.Supp. 797, 807 (E.D. N.C. 1986), *aff'd*, 833 F.2d 1006 (4th Cir. 1987); *Junker v. Midterra Associates, Inc.*, 49 F.R.D. 310, 313 (S.D. N.Y. 1970).

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1973); *Spatz v. Borenstein*, 513 F.Supp. 571, 577 (N.D. Ill. 1981); *Sohns v. Dahl*, 392 F.Supp. 1208 (W.D. Va. 1975). Indeed, Judge O'Brien's order of January 27, 1989, grants summary judgment against the fraud count only because of estoppel, not because of any purported exemption. Hamilton also conceded on appeal that the sale was not exempt from statutory fraud (Hamilton brief at 23 n.3).

As was pointed out in Hodory's motion for summary judgment, it was uncontroverted that the Weiss-Hamilton stock was not registered, that it was advertised in the Wall Street Journal, and that mails and telephones were used in connection with the sale. Finally, it was undisputed that Hamilton owned 100% of Weiss-Hamilton's stock, was Weiss-Hamilton's chief executive officer, was Weiss-Hamilton's sole director, was Weiss-Hamilton's sole officer, as president, secretary, and treasurer, and controlled Weiss-Hamilton's books and records.

Section 4(1) "was designed to exempt *routine trading transactions* with respect to securities already issued and not to exempt distributions by issuers . . . " *SEC v. Murphy*, 626 F.2d 633, 648 (9th Cir. 1980). Hamilton clearly was an "issuer." Section 77b(4) defines "issuer" as including "any person directly or indirectly *controlling* or controlled by *the issuer* . . . " As the district court noted in *SEC v. National Bankers Life Ins. Co.*, 324 F. Supp. 189, 194 (N.D. Tex. 1971), " 'issuer' includes both the company issuing the stocks and *control persons* of that company. A control person is liable for his sales of stock in a company he controls. . . . "

Clearly, there was no "private offering" in light of the Wall Street Journal advertisements. *See Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 689 (5th Cir. 1971) ("public advertising is incompatible with the claim of private offering"); *Waterman v. Alta Verde Industries, Inc.*, 643 F.Supp. 797, 807 (E.D. N.C. 1986), *aff'd*, 833 F.2d 1006 (4th Cir. 1987).

There also can be no "private offering" because Hodory did not "*already* have access to all information

which a full-fledged registration statement would provide . . . . " *Waterman v. Alta Verde Industries, Inc.*, 643 F. Supp. 797, 807 (E.D. N.C. 1986), *aff'd*, 833 F.2d 1006 (4th Cir. 1987), *citing, SEC v. Ralston Purina Co.*, 346 U.S. 119, 125-126 (1953).

SEC Rule 146 (17 CFR 230.146 (1982)) also indicates that the sale here was not "a private offering." Rule 146 provides, *inter alia*, that, for an offering to be private, it cannot be made via general solicitation or advertisement, and it can be made only to persons who have access, by means of an employment or family relationship or economic bargaining power, to the same type of information as would be contained in a registration statement. Here, Hamilton used the *Wall Street Journal*, and Hodory did *not* have access to the information by family, employment, or economic position. Thus, there can be no exemption.

This Court should grant this Writ to ensure that state courts recognize federal rights and controlling precedent, and to prevent Hodory's federal rights from being abused without redress.

CONCLUSION

For the reasons discussed above, a writ of certiorari should issue to review the judgment and opinion of the Florida District Court of Appeal for the Second District.

Respectfully submitted,

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IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA CIRCUIT CIVIL NO. 87-7958-11

ROBERT D. HODORY,

Plaintiff,

vs.

JOHN HAMILTON,

Defendant.

AMENDED COMPLAINT

COMES NOW, Plaintiff, ROBERT D. HODORY, by and through his undersigned attorneys, who hereby sues the Defendant, JOHN HAMILTON, alleging as follows:

GENERAL ALLEGATIONS

1. Defendant is and was a resident of Pinellas County, Florida, at all times material herein, and any alleged breach of contract or other violation of law occurred in Pinellas County, Florida.

2. On May 5, 1986, the parties hereto executed a certain Stock Purchase Agreement whereby Plaintiff contracted to buy from the Defendant and the Defendant contracted to sell to Plaintiff all of the issued and outstanding stock of WEISS-HAMILTON LUMBER COMPANY, INC., a Florida corporation, hereafter referred to as the "Company"; a copy of that stock purchase agreement is attached hereto and incorporated herein as Plaintiff's Exhibit 1.

3. Pertinent provisions of the said stock purchase agreement included, but were not limited to, the following:

"4. *Representations and Warranties of Seller.*

The Seller represents and warrants as follows:

E. Seller has delivered to Purchaser copies of the following financial statements, *all of which are true and complete and have been prepared in accordance with generally accepted accounting principles consistently followed throughout the period indicated:* (emphasis added)

1. The Balance Sheet as of the 28th day of February, 1986, which represents the true and complete statement as of its date of the Company's financial condition and of its assets and liabilities.

2. Statement of the Company's profit and loss accounts (including but without limitation all taxable income of every nature) up to and including the 28th day of February, 1986, which accurately represents the results of the Company's operation for the period indicated.

F. Except as to the extent reflected or reserved against in the Company's balance sheet as of the 28th day of February, 1986, the Company as of said date had no liabilities of any nature, whether accrued, absolute, contingent or otherwise, including without limitation, tax liabilities due or to become due, whether incurred in respect of or measured by the Company's income for any period prior to the 28th day of February, 1986, or arriving out of transactions entered into in any state of facts existing prior thereto. The Seller represents and warrants that he does

not know or have any reasonable grounds to know of any basis for the assertion against the Company as of the 28th day of February, 1986, or any liability of any nature or in any amount not fully reflected or reserved against in the balance sheet of the 28th day of February, 1986, except certain accrued items such as liability for corporate income tax, profit sharing plan funding and the like.

Seller has disclosed the existence of all accrued items such as liability for corporate income tax, profit sharing plan funding and such items not reflected on the balance sheet of February 28, 1986. Seller shall indemnify and save Purchaser harmless from any and all liabilities, claims and charges of any nature whatsoever arising out of such items not so reflected on said balance sheet and not so disclosed to Seller. *Any indemnification by Seller as required hereunder shall be charged against to obligation evidenced by a promissory note from Purchaser to Seller.* (emphasis added)

U. "Seller hereby acknowledges that Purchaser is reliant upon this warranty in addition to the other warranties contained in this Agreement in purchasing the stock, and *Seller represents and warrants that Purchaser has the right to fully rely upon the representations and warranties of the Seller with respect to all such tax matters contained in the paragraph on the accuracy of the Federal income tax return for the Company* (Form 1120) for the year ending March 31, 1986, and *all other tax returns and reports,* Federal, state and local, and other documents, certificates or exhibits pursuant to the provisions of this Agreement. (emphasis added)

V. Seller represents and warrants that Company has violated no law, regulations, or ordinances of the United States or of any state or municipal or governmental entity and knows of no claims, insertions, suits, demands or actions of any kind with respect to any such violation.

6. *Representations and Warranties as of Closing Date.*

The parties hereto agree that all representations and warranties contained in this Agreement will be true as of the date of closing and shall survive the closing.

7. *Reliance Upon and Enforcement of Representations, Warranties and Agreements.*

Seller hereby agrees *notwithstanding* any right of Purchaser to fully investigate the affairs of Company, and *notwithstanding* any knowledge of facts determined or determinable by Purchaser pursuant to such investigation, Purchaser has the right to fully rely upon the representations, warranties and agreements of the Seller contained in this Agreement and on the accuracy of *any* documents, certificate or exhibit given or delivered to Purchaser pursuant to the provisions of this Agreement. (emphasis added)

8. *Indemnification by Seller.*

Seller shall indemnify and hold Purchaser harmless against all loss, liability, damage or expense (including without limitation, interest, penalties and reasonable attorney's fees) arising from or in connection with any willful misstatement, misrepresentation or breach of any representation, warranty, covenant of agreement by Seller as set forth in this Agreement.

18. *Construction.*

This Agreement is being delivered and shall be construed and enforced in accordance with the laws of the State of Florida.

24. *Cross-Default.*

All documents or agreements to be executed at closing shall, where appropriate, contain a cross-default provision where a default in any one agreement shall constitute *a default in all agreements."* (emphasis added)

4. At the closing of the said Stock Purchase Agreement on June 16, 1986, the parties hereto, pursuant to said Stock Purchase Agreement, executed the following additional agreements:

a. A Promissory Note in the principal amount of $100,000.00 (a copy of which is attached hereto and incorporated herein as Plaintiff's Exhibit 2), constituting a portion of the purchase price to be paid Defendant by Plaintiff under the foregoing Stock Purchase Agreement.

b. Stock Pledge Agreement (a copy of which is attached hereto and incorporated herein as Plaintiff's Exhibit 3) securing payment of the abovesaid note.

c. A Covenant Not to Compete (a copy of which is attached hereto and incorporated herein as Plaintiff's Exhibit 4).

5. Subsequent to the closing on June 16, 1986, Plaintiff discovered that:

a. The Federal Corporate Income Tax Return (Form 1120) and the Federal Employer's Quarterly Return (Form 941) and other relevant financial information substantially overstated the income/compensation

allegedly paid by the corporation to its officers, including this Defendant.

b. For fiscal year ending March 31, 1985, George Weiss (former officer, director and owner of the Company) and Defendant, JOHN HAMILTON, claim they were paid $235,546.00 as per Federal Corporate Income Tax Return (Form 1120), page 2, Schedule E, for a total of $471,092.00. In fact, these individuals were paid only $61,408.00 during that fiscal year for a total of $122,816.00, for a difference of $348,276.00 less in actual compensation so paid. Federal Employer's Quarterly Tax Return (Form 941) reflected income of $157,451.00 each for the said George Weiss and Defendant, JOHN HAMILTON, for this fiscal year ($177,112.00 for Defendant, JOHN HAMILTON, and $182,687.00 for said George Weiss on a calendar year basis), when in fact these salaries were not in fact paid the said George Weiss and Defendant, JOHN HAMILTON.

c. The fiscal years ending March 31, 1984; March 31, 1983; and, March 31, 1982, there were, likewise, discrepancies between compensation reflected on page 2, Schedule E, Federal Corporate Income Tax Return (Form 1120) and the Federal Employer's Quarterly Tax Return (Form 941) for each of those fiscal years. In those respective years, George Weiss and Defendant, JOHN HAMILTON were actually paid $94,812.00, $41,178.00, and $40,000.00 less in actual salaries than was represented to Plaintiff and so indicated on the abovesaid Federal Income Tax Returns Form 1120 for the above three fiscal years.

d. The schedule of accounts receivable failed to contain a reserve for bad debts in the amount of $60,000.00 and set forth in Section "K" of the Stock Purchase Agreement.

f. Defendant failed to disclose that the former officers' salaries were overstated, creating a potential tax liability for the Company for all four preceding years. This caused an additional overstatement in the Company pension plan and correspondingly, the Company pension plan was overfunded.

g. Defendant failed to disclose that there were substantial funds expended from a bank credit line subsequent to the signing of the contract on May 6, but prior to the closing on June 16, 1986. The Stock Purchase Agreement required that the Seller notify the Buyer of any expenditures in excess of $5,000.00 other than expenditures necessary for the normal course of business and the Defendant failed to give such notification to the Plaintiff.

h. Records and documents supplied Plaintiff by Defendant failed to disclose the forgiveness of an obligation previously on the books of and due the Company by one John Dawson, an individual who had been employed by the Defendant to act as a broker/dealer in the stock purchase transaction.

i. Certain accounts payable incurred by the Company subsequent to the contract but prior to closing were not posted and/or recorded in the Company books, therefore creating an inaccurate and unfair representation of the amount of accounts payable and which further created an illusion that Defendant was in compliance with paragraph 26 of the Stock Purchase Agreement

wherein the parties agreed that the excess of accounts receivable over trade payables should be equal to the sum of $150,000.00, when in fact this was not the case at the time of closing.

j. Transactions occurred within the Company but were not disclosed to Plaintiff involving the former owner, George Weiss, wherein Mr. Weiss acquired ownership of an automobile used by him which had been owned by the Company and which automobile had been paid for with Company funds rather than from Mr. Weiss' separate funds.

k. Defendant failed to disclose the actual amount of Company contribution to CIGNA. The actual contribution was determined by Buyer subsequent to closing.

l. Defendant failed to disclose the existence of a law suit against WEISS-HAMILTON LUMBER COMPANY which allowed Defendant to retain settlement proceeds from said lawsuit as leverage for his own benefit subsequent to closing.

6. The facts alleged in paragraph 5 above and each of them constitute both breaches of warranty of the said Stock Purchase Agreement and further constitute misrepresentations and omissions of material facts regarding the sale of the stock of WEISS-HAMILTON LUMBER COMPANY, INC.

7. Plaintiff has performed all conditions precedent called upon him to be performed so as to entitle him to maintain this action.

8. Plaintiff believed and relied upon all of the warranties and representations of the Defendant as set forth in the said Stock Purchase Agreement.

9. Plaintiff has retained the law firm of HARRIS, BARRETT, MANN & DEW, and agree to pay at a reasonable fee for its services rendered herein.

* * *

COUNT IV – FEDERAL SECURITIES REGISTRATION VIOLATIONS

36. Plaintiff realleges paragraphs 1 through 9. Plaintiff seeks damages in excess of $5,000.00.

37. The Stock Purchase Agreement entered into between the parties as alleged above was a securities transaction governed by the Federal Securities and Exchange Act of 1933.

38. Section 5(a) of the Securities and Exchange Act of 1933 mandates that the sale of securities shall be registered with the Securities and Exchange Commission and that it shall be unlawful for any person, directly or indirectly:

(a) To make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(b) to carry or cause to be carried through the mails or in interstate commerce by any means or instrument of transportation, any such security for the purpose of sale or for delivery after sale.

39. At all times material hereto, Defendant failed to register the sale of securities which are the subject of this action, with the Securities and Exchange Commission as required by the Securities and Exchange Act of 1933.

40. Stock which is the subject of this transaction was, at all times material hereto, a "security" as defined by Section 2 of the Security and Exchange Act of 1933. Defendant, at all times material hereto, was a Seller of said securities and did offer for sale and sell securities as defined by Section 2 of the Securities and Exchange Act of 1933.

41. The sale of securities heretofore alleged was a securities transaction governed by the Securities and Exchange Act of 1933 and was a public offering subject to registration.

42. Said securities were publicly offered for sale and Defendant, through the use of a broker, engaged in public and interstate solicitation.

43. The offer for sale and the sale of said securities was effectuated by the utilization of communication and interstate commerce and the use of interstate communication, including telephonic communication and the use of mails.

WHEREFORE, Plaintiff demands the consideration paid for such security with interest thereon, rescission, damages, costs and attorney's fees against Defendant.

COUNT V – FEDERAL SECURITIES
ANTI-FRAUD PROVISION VIOLATION

44. Plaintiff realleges paragraphs 1 through 9 above. Plaintiff seeks damages in excess of $5,000.00.

45. The Stock Purchase Agreement entered into between the parties as alleged above and the sale of said securities, was a securities transaction governed by the Federal Securities and Exchange Act of 1933 and is governed by said Act.

46. Section 12.2 of the Securities and Exchange Act of 1933 mandates that any person:

(a) Offers or sells a security in violation of Section 5 (of the 1933 Act) or;

(b) offers or sells a security (whether or not exempted by the provisions of Section 3, other than paragraph [2] of subsection [a] thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, as an exercise of reasonable care could not have known of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon . . .

47. Defendant, in the offering for sale and in sale of said securities, provided to Plaintiff a prospectus, as defined by the 1933 Act and utilized instrumentalities of interstate commerce, specifically telephonic and mail communications and solicited the sale in a national advertising publication.

48. As alleged herein, prior to closing, Defendant misrepresented or omitted to state material facts of which Plaintiff had no knowledge.

WHEREFORE, Plaintiff demands the consideration paid for such security with interest thereon, rescission, damages, costs and attorney's fees against Defendant.

* * *

HARRIS, BARRETT, MANN
& DEW

By: _____

John D. Kiernan
Post Office Drawer 1441
St. Petersburg, FL 33731-1441
(813) 892-3100
Attorneys for Plaintiff

VERIFICATION OF PLEADINGS

I HEREBY CERTIFY AND SWEAR to all of the foregoing allegations as being true and correct.

/s/ Robert D. Hodory
ROBERT D. HODORY

STATE OF OHIO)
COUNTY OF HAMILTON) SS.
)

Before me, personally appeared ROBERT D. HODORY, who after being duly sworn, acknowledged that the foregoing is true and correct to the best of his belief.

Sworn to and subscribed before me this 2nd day of February, 1988.

/s/ Charles J. Kelly
NOTARY PUBLIC

My Commission Expires:

CHARLES J. KELLY,
Attorney at Law
NOTARY PUBLIC•STATE OF OHIO
My Commission has no expiration
date. Section 147.03 R. C.

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT IN AND
FOR PINELLAS COUNTY, FLORIDA
CASE NO. 87-7958-11

ROBERT D. HODORY,

Plaintiff,

vs.

JOHN HAMILTON,

Defendant.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, JOHN HAMILTON, by and through his undersigned attorney and pursuant to Florida Rule of Civil Procedure 1.510, hereby moves this Honorable Court for Partial Summary Judgment on the Amended Complaint of Plaintiff. The grounds upon which the motion is based and the substantial matters of law to be argued are as follows:

1. The pleadings, depositions, answers to interrogatories, together with the Affidavits filed in this cause show that there is no genuine issue as to any material fact and the Defendant is entitled to judgment as a matter of law on the following issues and claims of Plaintiff:

* * *

C. Count IV of the Amended Complaint alleging violations of Section 5 of the Securities Act of 1933, 15 USC Section 77d, based upon failure to register securities, is barred by the applicable Statute of Limitations, 15 USC

Section 77 (m) in that Plaintiff failed to bring his action within one year after the sale of the securities.

D. With respect to Count IV of the Amended Complaint, the sale of stock in Weiss Hamilton Lumber by Defendant, John Hamilton, to Plaintiff is exempt from registration pursuant to 15 U.S.C. Section 77 (d)(1).

E. Count V of the Amended Complaint alleging violations of Section 12 (2) of the Securities Act of 1933, 15 USC Section 77 (e) based upon alleged misrepresentations or omissions of material facts, is barred by the applicable Statute of Limitations, Section 15 U.S.C. Section 77 (m), in that Plaintiff failed to bring this action within one year after he discovered or should have discovered in the exercise of reasonable diligence, the alleged untrue statements or omissions.

F. With respect to Counts IV and V of the Amended Complaint, Plaintiff is estopped from seeking rescission and damages based upon his conduct after the purchase, including active management and participation in the affairs of the corporation, controlling the funds of the corporation after purchase, and obtaining substantial benefits from ownership of the stock after purchase.

* * *

IN THE CIRCUIT COURT FOR PINELLAS COUNTY,
FLORIDA CIRCUIT CIVIL CASE NO. 87-7958-11

ROBERT D. HODORY,

Plaintiff,

vs.

JOHN HAMILTON,

Defendant.

AMENDED MOTION FOR PARTIAL
SUMMARY JUDGMENT

Defendant, JOHN HAMILTON, by and through his undersigned attorney and pursuant to Rule 1.510, Florida Rules of Civil Procedure, hereby moves this Honorable Court for Partial Summary Judgment on the Amended Complaint of Plaintiff, ROBERT HODORY. The grounds upon which this Motion is based and the substantial matters of law to be argued are as follows:

1. The pleadings, depositions, answers to interrogatories, and other discovery, together with the Affidavits filed in this cause, show that there is no genuine issue as to any material fact, and the Defendant is entitled to judgment as a matter of law on the following issues and claims of Plaintiff:

* * *

c. Count IV of the Amended Complaint alleging violations of Section 5 of the Securities Act of 1933, 15 USC Section 77(d), based upon failure to register securities, is barred by the applicable Statute of Limitations, 15

USC Section 77(m), in that Plaintiff failed to bring his action within one (1) year after the sale of the securities.

d. With respect to Count IV of the Amended Complaint, the sale of the stock of Weiss-Hamilton Lumber Company, Inc. by Defendant to Plaintiff is exempt from registration pursuant to 15 USC Section 77(d)(1) or 15 USC Section 77(d)(2).

e. With respect to Count IV of the Amended Complaint, the sale of the stock of Weiss-Hamilton Lumber Company, Inc. by Defendant was a private sale of securities to one purchaser, the Plaintiff, who did not acquire the securities with an intent to distribute them to the public.

f. Count V of the Amended Complaint alleging violations of Section 12(2) of the Securities Act of 1933, 15 USC Section 77(e), based upon alleged misrepresentations or omissions of material facts, is barred by the applicable Statute of Limitations, Section 15 USC Section 77(m), in that Plaintiff failed to bring this action within one (1) year after he discovered or should have discovered in the exercise of reasonable diligence, the alleged misrepresentations or omissions.

g. With respect to Counts IV and V of the Amended Complaint, Plaintiff is estopped from seeking rescission and damages based upon his conduct before and after the purchase, including active management and participation in the affairs of Weiss-Hamilton Lumber Company, Inc., being provided with access to sufficient and complete information which would be contained in a registration statement, controlling the funds of the corporation after

purchase and obtaining substantial benefits from ownership of the stock after purchase. Further Plaintiff is a sophisticated investor with a substantial net worth who utilized the advice of accountants and attorneys in connection with the purchase.

* * *

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA CIRCUIT CIVIL NO. 87-7958-11

ROBERT D. HODORY,

Plaintiff,

vs.

JOHN HAMILTON,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS AMENDED ON AUGUST 19, 1988

Defendant's Motion for Partial Summary Judgment (dated June 21, 1988) as amended (August 19, 1988) and Plaintiff's Motion for Partial Summary Judgment (June 30, 1988) was heard by the Court at a hearing on October 18, 1988. Both parties, through counsel, submitted memoranda of fact and law which has been considered by the Court in its rulings. The Court finds as follows:

A. Count II of the Amended Complaint alleges a securities violation or failure to register a security under Section 517.07, 517.081 and 517.012. Count IV of the Amended Complaint claims a security violation of the Federal Securities and Exchange Act (particular Sections cited in the complaint and Plaintiff's Memorandum of Law).

B. The Court concludes that there is no material issue of fact and that Defendant is entitled as a matter of law to a partial summary judgment with respect to Counts II and IV. In reaching this conclusion, the Court

adopts the legal arguments set forth in Defendant's Memorandum in Support of its Amended Motion for Partial Summary Judgment (October 5, 1988).

C. The stock in Weiss-Hamilton Lumber Co. Inc., subject to the transaction described in the Complaint did not require registration under either the Federal or State Act; further, the Statute of Limitation, Section 13 of the Federal Securities Act of 1933, limiting actions to one year, bars Count IV of the Amended Complaint; and, finally, Plaintiff is estopped from bringing his claims under Counts II and IV of the Amended Complaint.

D. The Court finds that Plaintiff is legally estopped from bringing his claims stated in Count III under (Chapter 517- Securities Fraud) and Count V (Federal Securities Fraud) for fraud and rescission under the facts and legal defense of estoppel.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. Defendant's Motion for Partial Summary Judgment as to Counts II, III, IV and V is granted.

2. Plaintiff's Motion for Partial Summary Judgment (June 30, 1988) is denied.

3. This Order Granting Partial Summary Judgment shall be incorporated into a Final Judgment with respect to the matters contained herein.

DONE AND ORDERED in Chambers, St. Petersburg, Pinellas County, Florida on this 27 day of Jan., 1989.

/s/ Gerard J. O'Brien, Jr.
CIRCUIT JUDGE

IN THE CIRCUIT COURT FOR PINELLAS COUNTY,
FLORIDA CIRCUIT CIVIL CASE NO. 87-7958-11

ROBERT D. HODORY,

Plaintiff,

vs.

JOHN HAMILTON,

Defendant.

FINAL JUDGMENT

This Final Judgment is based on prior Court rulings and the trial before this Court on the evidence presented, and it is, therefore,

ORDERED AND ADJUDGED:

AT TO PLAINTIFF'S AMENDED COMPLAINT:

* * *

2. With respect to Counts II, III, IV and V and based upon the Court's findings as set forth in the Order of January 27, 1989, granting Defendant's Motion for Partial Summary Judgment, Plaintiff shall take nothing by these counts.

* * *

DONE AND ORDERED, in Chambers at St. Petersburg, Pinellas County, Florida, this 21 day of July, 1989.

/s/ Gerard J. O'Brien, Jr.
CIRCUIT JUDGE

Copies furnished to:

James A. Devito, Esquire
Donald E. Hemke, Esquire

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
SECOND DISTRICT

ROBERT D. HODORY, Appellant,	)	
v.	)	Case No. 89-02353
JOHN HAMILTON, Appellee.	)	

Opinion filed December 14, 1990.

Appeal from the Circuit Court
for Pinellas County;
Gerard J. O'Brien, Judge.

Donald E. Hemke of Carlton,
Fields, Ward, Emmanuel,
Smith & Cutler, P.A.,
Tampa, for Appellant.

James A. Devito of Devito
and Colen, P.A.,
St. Petersburg,
for Appellee.

PER CURIAM.

Affirmed.

SCHEB, A.C.J., and FRANK and ALTENBERND, JJ., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA JANUARY 29, 1991

ROBERT D. HODORY, Appellant(s), v. JOHN HAMILTON, Appellee(s).	)	Case No. 89-02353

Counsel for appellant having filed a motion for rehearing; motion for clarification and for certification in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST
/s/ William A. Haddad
WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

§ 77d. Exempted transactions

The provisions of section 77e of this title shall not apply to –

(1) transactions by any person other than an issuer, underwriter, or dealer

(2) transactions by an issuer not involving any public offering. . . .

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§ 77e. Prohibitions relating to interstate commerce and the mails

Sale or delivery after sale of unregistered securities

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale. . . .

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§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(2) of this title more than three years after the sale.

Supreme Court, U.S.
FILED
MAY 29 1991
OFFICE OF THE CLERK

No. 90-1681

In The

Supreme Court of the United States

October Term, 1990

ROBERT D. HODORY,

Petitioner,

v.

JOHN HAMILTON,

Respondent.

Petition For A Writ Of Certiorari To The Florida District Court Of Appeal For The Second District

RESPONDENT'S BRIEF IN OPPOSITION

J. RICHARD RAHTER
KIEFFER & RAHTER, P.A.
6670 First Avenue South
St. Petersburg, FL 33707
(813) 344-5788
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Florida courts refused to recognize Hodory's federal rights and controlling case law?

2. Whether the Florida courts deprived Hodory of his federal rights where, in granting summary judgment, they disregarded controlling precedent from this Court?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Florida District Court of Appeal for the Second District were petitioner Robert D. Hodory and respondent John Hamilton.

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*These statutes are re-printed in the Appendix.

JURISDICTION

Petitioner has mistakenly relied on 28 U.S.C. § 2104 (1988) for jurisdiction for this Court to review the final decision of the Second District Court of Appeal. Respondent presumes that Petitioner intended to seek jurisdiction for review based upon 28 U.S.C. § 1257 (1988).

STATUTES INVOLVED

The statute principally involved in the decision is the Securities Act of 1933, relevant portions of which are reproduced in the Appendix.

STATEMENT OF THE CASE

HAMILTON adopts HODORY'S statement of the case with the following noted additions and exceptions.

The Contract to Sell

Although contact first occurred in the fall of 1985 on the stock offering of Weiss and HAMILTON, sole stockholders of the company, there was no contract consummated from this first offering. In January, 1986, after the corporation was restructured with HAMILTON, as the sole remaining stockholder, HODORY was offered and sold the HAMILTON stock. With respect to this offer, no announcements were published, nor was there any other form of solicitation.

HAMILTON contracted with HODORY for the sale of his stock in Weiss-Hamilton Lumber Company, Inc., on May 5, 1986. There was an investigation period following contract for verification of the financial condition of the company. HODORY was represented by counsel and had an accountant who assisted him in verifying the company finances. After the due diligence period, the contracts were closed on June 16, 1986.[1]

An integral part of the stock purchase agreement is paragraph 23 (Appendix 3), which provided that the sale was an "isolated transaction" and that the parties agreed that it "was exempt from securities laws." Their agreement also required that HODORY "verify the accuracy" of the financial information as a condition of closing (paragraph 3A) (Appendix 1). HODORY had the "absolute discretion" to terminate the agreement (paragraph 7) (Appendix 2). HODORY agreed to perform all that was required in their agreement (paragraph 5) (Appendix 1) and HAMILTON justifiably relied on their agreement. As part of the agreements, HAMILTON remained as a management employee of the company. Part of the purchase price was assigned to the non-compete agreement and a part financed by a purchase money note. The note matured on June 16, 1987.

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[1] The documents were quite extensive and included a Stock Purchase Agreement, Stock Pledge Agreement, Employment Agreement, Covenant Not to Complete Agreement, Promissory Note and Assumption of Guarantees.

The Circuit Court's Decision

HODORY filed the complaint on June 3, 1987. Between the closing and filing of this suit, HODORY was the sole shareholder and controlled management of the company as the CEO and chairman of the board of directors. In addition, he brought in his own team of senior management. Thus, the transaction was a sale of the entire business, together with the sale of stock.

HODORY obtained a temporary injunction, upon filing his complaint, that remained in force until a final judgment was entered dissolving it. HAMILTON filed counterclaims seeking the balance of monies due on the defaulted purchase money note and non-compete agreement. The injunction prevented HAMILTON from exercising his rights to the stock under the pledge agreement and left HODORY in control of the corporation through the course of the litigation.

HODORY filed his motion for partial final summary judgment on June 30, 1988, with an attached memorandum of law which set forth the grounds for the motion. It sought an order granting the rescission remedy on the federal claims for failing to register the stock and misrepresentation of material facts. (Counts IV and V). In support of the motion he filed only a single affidavit showing non-registration and a corporate resolution.

HAMILTON filed his motion for partial summary judgment on June 27, 1988, which was amended on August 19, 1988. He sought partial summary judgment on his defenses that the stock sale was exempt from registration under both federal and state statutes, that HODORY was estopped from asserting the statutory registration

and fraud claims, and that the federal registration claim was barred by the one-year statute of limitation.

HAMILTON filed a second motion for partial summary judgment on November 14, 1988. It sought a ruling on those factual allegations of the amended complaint of which HODORY had prior knowledge and summary judgment on those allegations not supported by any evidence after 17 months of litigation and extensive discovery. It asked for dismissal of the rescission remedy.

In support of his motions, HAMILTON filed numerous affidavits, the depositions of the parties and miscellaneous correspondence between counsel. HAMILTON propounded extensive interrogatories on these allegations prior to a hearing on the motion, but they remained unanswered at the time of that hearing.[2]

On January 27, 1989, the trial court entered a partial summary judgment on HAMILTON'S motion of August 19, 1988. And, on March 7, 1989, an order was entered granting, in part, HAMILTON'S motion of November 14, 1988 (Appendix 4). HAMILTON'S counterclaims were tried on February 27, 1989 and final judgment was entered on July 21, 1989. It includes final judgments on HAMILTON'S counterclaims, breach of promissory note, breach of covenant not to compete and breach of the stock pledge agreement.

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[2] These interrogatories were the subject of proceedings to compel from August to the time the answers were filed, on February 6, 1989, after the hearings on the motions for partial summary judgment.

The District Court of Appeal's Decision and Subsequent Filings

The facts on which HAMILTON'S counterclaims are based and the judgments on the counterclaims were not argued as error in HODORY's appeal. He argued error only in the rulings made by the trial court's partial summary judgment, which was the basis for the final judgment denying his amended complaint.

On appeal the trial court decision was affirmed in a per curiam opinion on December 14, 1990. HODORY'S motion for rehearing was denied. On April 12, 1990 HODORY also filed suit in the United States District Court for the Middle District of Florida. The parties filed a stipulation to abate this action pending the outcome of HODORY's appeal. An order granting the stipulation was entered July 5, 1990. As of this date, although the appeal in state court has been completed, HODORY has done nothing more on his federal action.

Subsequently, HAMILTON in the course of executing the judgments was approached by HODORY. HODORY offered HAMILTON $30,000.00 toward payment of the judgment if he would forebear for 60 days so that he could make other arrangements for payment. HAMILTON agreed, only to find that HODORY now seeks a writ from this Honorable Court.

REASONS FOR DENYING THE WRIT

1. **The Writ Should Be Denied Because the Florida Courts Properly Considered the Petitioner's Federal Rights and Controlling Precedent from this Court.**

2. **The Writ Should Be Denied Because Petitioner was Not Deprived of Federal Rights.**

Exemption from Registration. In arguing that the Florida courts have disregarded controlling precedent from this Court, Petitioner relies upon a misstatement of the decision in *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), by stating that the sale of all of a company's stock is subject to the securities acts. (p.5) In fact, the Court itself limited it's decision to "the question whether the sale of all of the stock of a company is a securities transaction subject to the anti-fraud provisions of the federal securities laws." *Landreth* at 683. Thus, *Landreth* is not controlling here as to whether the sale of all of the stock of a company is a securities transaction subject to the registration requirements of 15 U.S.C. § 77(d) or civil liability for non-registration under 15 U.S.C. § 77(e). Recall, that the basis for HAMILTON'S motion for partial summary judgment on the claim for non-registration was that the transaction was exempt, that the claim was barred by the statute of limitations, and that HODORY was estopped from asserting the registration claim.

The order of the Florida court with respect to non-registration of the securities did not rely on *Landreth* and there is no conflict with this Court's holding in that decision. Rather, in adopting the legal arguments set forth in HAMILTON'S Memorandum, the Florida court relied upon undisputed facts and correctly applied the

"sale of business doctrine" which continues to apply to the federal registration requirements where the stock issue possesses all of the characteristics of stock, but the stock could not be a security because managerial control of the business has passed into the hands of the purchaser, and, thus, the transaction is a commercial venture rather than a typical investment where the anticipation of profit is derived from the efforts of others. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), and *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

Additionally, HAMILTON'S Memorandum as relied upon by the Florida courts correctly set forth that the HAMILTON/HODORY sale transaction was exempt under 15 U.S.C. § 77d,[3] because the offer of sale or sale was not a public offering or distribution but an "isolated transaction." And, HODORY represented that his sophistication and professional consultants were adequate protection, thus, he did not need the protection of registration laws.

Contrary to HODORY'S Petition (p.11), HAMILTON did meet the burden of proving the exemption. The registration requirement did not apply to this transaction because HAMILTON was neither "an issuer, underwriter, or dealer," 15 U.S.C. § 77d(1).

"Issuer" is defined "as every person who issues or proposes to issue any security . . . ", 15 U.S.C. § 77b(4). The stock was issued by Weiss-Hamilton Lumber Company Inc., not HAMILTON. See *Shaw v. United States*, 131

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[3] The Federal Securities Act of 1933, Sec. 4(1)

F.2d 476 (9th Cir. 1942). HODORY argued that HAMILTON is an issuer because he "controlled" Weiss-Hamilton, citing *SEC v. National Bankers Life Ins. Co.*, 324 F. Supp. 189 (N.D.Tex. 1971).[4] However the Court made it clear that the controlling person becomes an "issuer" only when involved in a transaction with an underwriter and in association with the distribution of a security, *SEC v. National Bankers Life Ins. Co.*, 334 F. Supp 454, 455 (N.D.Tex. 1971).

The HAMILTON/HODORY deal did not involve a distribution. While the Act does not define distribution of a security, it has been held to be "the entire process by which in the course of a public offering the block of securities is dispersed and ultimately comes to rest in the hands of the investing public", *SEC v. Computronics Industry*, 294 F. Supp. 1136 (N.D.Tex 1968). The mere advertisement in *The Wall Street Journal*, in June-1985, for the sale of the company (then owned by Messrs. Weiss and Hamilton) was insufficient to make the 1986 negotiation and contract between HAMILTON and HODORY a public offering or "distribution".[5] The advertised offering of the Weiss-Hamilton stock had terminated in November of 1985. HAMILTON and HODORY came together in the winter of 1986 for the sale of HAMILTON'S stock only. At

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[4] The Court issued a second opinion on Nov. 18, 1971, cited in 334 F. Supp. 454.

[5] In June, 1985, *The Wall Street Journal* announced an offering price of $1,500,000.00. In February, 1986, the offering price was $750,000.00 for Mr. Hamilton's stock only. Contrary to the claim made by HODORY, there is no evidence to show that the 1986 offering was ever advertised.

that time, the structure of the company and the basic deal were different.

Petitioner states that "there was no 'private offering' in light of the *Wall Street Journal* advertisements." (p.12) But, indeed, to clarify this very issue of "distribution", HODORY agrees and represents in paragraph 23 (Appendix 3) of the stock purchase agreement that the transaction is "isolated" and not a public distribution. In that same paragraph, to avoid any doubt regarding the sale of stock and the need for registration, HODORY states that he "has other businesses and is sophisticated enough to evaluate the risks of such purchase or has sought the advice of professional counselors". He admits that he is able to fend for himself; thus, he does not need the protection of the securities registration laws. See *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953), also, *Stottler, Stagg & Associates v. Argo*, 403 So. 2d 617 (Fla. 5th DCA 1981). In summary, the Florida courts did not disregard controlling precedent with regard to securities registration.

Statute of limitations. 15 U.S.C. § 77m provides that no action shall be maintained to enforce a liability created under the registration requirement, 15 U.S.C. § 77e, unless brought in one year.

The agreements were signed on May 5, 1986. HODORY'S action was not filed until June 3, 1987. The amended complaint stated that the stock purchase agreement was "a securities transaction" governed by the Act. The agreement between the parties states in part, that the sale is "isolated", etc., and registration is unnecessary, undisputed evidence that both parties had knowledge of the non-registration at contract. Knowledge or reason to

know of a claim is typically the basis for the running of the statute of limitations. The Federal courts have held that the statute begins to run on the date a binding contract is entered into. *Amoroso v. Southwest Drilling Multi-Rig*, 646 F. Supp. 141 (M.D. Cal. 1986); *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876 (2nd Cir. 1972); *Armbrister v. Roland International Corp.*, 667 F. Supp. 802 (M.D.Fla 1987). Since HODORY knew that the stock was not registered at contract (May 5, 1986), and the suit was not filed until June 3, 1987, 13 months later, the action was appropriately barred under 15 U.S.C. § 77m.

Estoppel. The trial court properly granted the defense of estoppel against HODORY'S registration claims because of paragraph 23 (Appendix 3) of the agreement, his control and management of the company after closing and throughout the litigation.

HODORY, then seeking rescission, never offered to return the stock. Quite the contrary, he obtained injunctive relief to continue controlling and managing the company through the course of litigation.

Likewise, HODORY was properly estopped from making fraud claims for the same reasons noted above. His alleged basis for the fraud claim, that he had discovered certain financial discrepancies after closing, was found to be "no more than bare conclusions . . . not supported by any evidence." (Appendix 4) The court's ruling was consistent with the principle that "to defeat a motion which is supported by evidence which reveals no genuine issue, it is not sufficient for the opposing party merely to assert that an issue does exist. If the moving

party presents evidence to support the claimed non-existence of a material issue, he will be entitled to a summary judgment unless the opposing party comes forward with some evidence which will change the result – that is, evidence sufficient to generate an issue to change the result." *Harvey Building, Inc. v. Haley*, 175 So. 2d 780 (1965 Fla.), at pp. 782-783; see, also, *Page v. Staley*, 226 So. 2d 129 (Fla. 4th DCA 1969).

Petitioner states (p. 7) that in ruling on estoppel Judge O'Brien did not have the benefit of *Pinter v. Dahl*, 486 U.S. 622 (1988). On appeal HAMILTON agreed that while *Pinter* requires that the parties be "in pari delicto" for the estoppel defense to lie, the undisputed evidence is that Hodory's culpability is at least equal to HAMILTON'S if not greater. In the transaction documents approved by his attorney, HODORY admits non-registration, states he is sophisticated, states the transaction is isolated, assumes the burden of due diligence, obtains the absolute right to terminate, closes on the financial information, controls the corporation, sues after one year, retains control and management of the company, never offers to return the stock, and then seeks rescission. Equity and law permit application of the defense.

The Court should deny this Writ. The courts below fully considered and correctly decided the issues without any disregard for controlling precedent or Petitioner's rights.

The issues presented by Petitioner do not warrant review by this Court. There is no conflict with *Landreth* and Petitioner's allegations are not supported by the findings.

CONCLUSION

For the reasons discussed above, a writ of certiorari should not be issued to review the judgment and opinion of the Florida District Court of Appeal for the Second District.

Respectfully Submitted,

J. RICHARD RAHTER
KIEFFER & RAHTER, P.A.
6670 First Avenue South
St. Petersburg, FL 33707
(813) 344-5788
Counsel for Respondent

STOCK PURCHASE AGREEMENT

THIS AGREEMENT made this 5th day of May, 1986 by and between JOHN HAMILTON, hereinafter referred to as SELLER, and ROBERT D. HODORY, hereinafter referred to as PURCHASER.

* * *

3. *Conditions precedent to closing.* The closing herein and the payment of the purchase price as contemplated herein shall be conditioned upon the following:

   A. Purchaser's verification of the accuracy of the financial statements previously supplied to them dated February 28, 1986, and those received by Purchaser subsequent to that date. In order to allow Purchaser to verify the accuracy of such financial statements, Seller will make available to Purchaser such books and records of account, tax returns or other data for such periods of time as Purchaser may request, including, but not limited to all of such documents and data for the five (5) year period immediately proceeding the date of this Agreement. Seller shall continue until the closing to furnish Purchaser with up-to-date financial data generated in accordance with Purchaser's normal accounting and tax procedures.

* * *

5. *Representations of Purchaser.* The Purchaser represents and warrants and agrees with the Seller that he will do and perform all things called for under this Agreement required of him to be performed and will cause all things required of him in this Agreement to

be performed in accordance with the terms hereof. Purchaser further represents and warrants to Seller that:

A. There are no suits, governmental proceedings or claims pending or to the knowledge of Purchaser threatened against him which might materially affect the ability of Purchaser to fulfill the financial obligations incident to the closing of this Agreement.

B. The foregoing representations and warranties are made by Purchaser with the knowledge and expectation that Seller is placing complete reliance thereon.

* * *

7. *Reliance upon and Enforcement of Representations, Warranties and Agreements.* Seller hereby agrees that notwithstanding any right of Purchaser to fully investigate the affairs of Company, and notwithstanding any knowledge of facts determined or determinable by Purchaser pursuant to such investigation, Purchaser has the right to fully rely upon the representations, warranties and agreements of the Seller contained in this Agreement and on the accuracy of any documents, certificate or exhibit given or delivered to Purchaser pursuant to the provisions of this Agreement. In the event that during the course of investigations conducted by the Purchaser, Purchaser determines such financial information or other representations or warranties are substantially inaccurate or untrue, Purchaser shall have the right, upon showing of said substantial inaccuracies or untruths, in his complete and absolute discretion, to terminate all of his obligations under this Agreement by giving written notice of such intention to

terminate to Seller. In the event of such termination, the earnest money shall be refunded to Purchaser and Seller shall have no further obligations to each other with respect to the sale of the stock of the Company.

* * *

23. The parties agree that the sale of stock contemplated herein is an isolated transaction, done for investment purposes and that the same shall be exempt from the Securities Laws of the United States and the State of Florida. The Purchaser acknowledges that he has other businesses and is sophisticated enough to evaluate the risks of such a purchase or has sought advise from professional counselors.

* * *

IN WITNESS WHEREOF, the parties have duly executed this Agreement this 5th day of May, 1986.

Signed and Sealed in the presence of :

S/_____
John Hamilton, Seller

_____

_____
Witnesses as to Seller

_____

_____
Witnesses as to Purchaser

S/_____
Robert Hodory, D.D.S.,
Purchaser

IN THE CIRCUIT COURT FOR
PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL CASE NO. 87-7958-11

ROBERT D. HODORY,
Plaintiff,

vs.

JOHN HAMILTON,

Defendant.

_____/

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF NOVEMBER 14, 1988

Defendant's, JOHN HAMILTON, Motion for Partial Summary Judgment, of November 14, 1988, having come on to be heard and the Court having heard argument of counsel, reviewed the filings in support of the Motion and being otherwise fully advised in the premises, finds as follows:

A. With respect to the first issue, as set forth in paragraph 1 of the above Motion, the Court finds that there is no issue of material fact, with regard to paragraph 5 a, b, c, f and k, in that Plaintiff knew or should have known the facts alleged in paragraph 5 a, b, c, f and k of the Amended Complaint prior to the closing on June 16, 1986.

B. With respect to the allegations in paragraph 5 of the Amended Complaint, subparagraphs c, d, g, h, i, j and l, the Court finds that they are mere bare conclusions by the Plaintiff, unsupported by any evidence filed in this cause beyond Plaintiff's general allegations. Plaintiff's

statements in paragraph 5 c, d, g, h, i, j and l of the Amended Complaint, after seventeen (17) months of litigation, consist of no more than mere bare conclusions and are not supported by any evidence. The Court finds, therefore, that there is no genuine issue of material fact.

C. Paragraph 3 of the Motion for Partial Summary Judgment raised the remedy of rescission, with respect to the sale of stock under the Stock Pledge Agreement. The Court does not have to reach that issue because of its prior rulings on the securities claims.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

1. That Defendant's Motion for Partial Summary Judgment of November 14, 1988, paragraph 1, is granted. Plaintiff knew or should have known the facts alleged in paragraph 5 a, b, c, f and k, prior to the closing on June 16, 1986.

2. That, with respect to paragraphs 5 c, d, g, h, i, j and l, Plaintiff has failed to support his allegations with any evidence beyond mere bare conclusions and, therefore, all these allegations are dismissed.

DONE AND ORDERED, in Chambers, at St. Petersburg, Pinellas County, Florida, this 7 day of March, 1989.

/s/ GERARD J. O'BRIEN, JR.
CIRCUIT JUDGE

Copies furnished to:

James A. Devito, Esq.
Donald E. Hemke, Esq.

§ 77b(4)

The term "issuer" means every person who issues or proposes to issue any security; . . .

* * *

§ 77d. Exempted transactions

The provisions of section 77e of this title shall not apply to –

(1) transactions by any person other than an issuer, underwriter, or dealer

(2) transactions by an issuer not involving any public offering . . .

* * *

§ 77e. Prohibitions relating to interstate commerce and the mails

Sale or delivery after sale of unregistered securities

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale. . . .

* * *

§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(2) of this title more than three years after the sale.